SUPERIOR COURT OF CALIFORNIA

COUNTY OF SACRAMENTO

DATE/TIME	**NOVEMBER 19, 2018**	**DEPT. NO**	**28**
JUDGE	**HON. RICHARD K. SUEYOSHI**	**CLERK**	**E. GONZALEZ**
PHYSICIANS FOR SOCIAL RESPONSIBILITY – LOS ANGELES, a non-profit corporation; SOUTHERN CALIFORNIA FEDERATION OF SCIENTISTS, a non-profit corporation; COMMITTEE TO BRIDGE THE GAP, a non-profit corporation; and CONSUMER WATCHDOG, a non-profit corporation, **Petitioners,** **v.** **DEPARTMENT OF TOXIC SUBSTANCES CONTROL; DEPARTMENT OF PUBLIC HEALTH; and DOES 1 to 100,** **Respondents.** **THE BOEING COMPANY, a corporation; ROES 1 to 100,** **Real Party in Interest.**		**Case No.: 34-2013-80001589**	
Nature of Proceedings:	**RULING ON SUBMITTED MATTER RE: PETITION FOR WRIT OF MANDATE AND COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF**		

The petition for writ of mandate and complaint for injunctive and declaratory relief came before the Court for oral argument on November 9, 2018. Prior to the hearing, the Court issued an order to appear, with questions it wished the parties to discuss as part of their oral presentations. Upon hearing oral argument, the Court took the matter under submission. Having considered the briefs and arguments pertaining to each motion, the Court now rules as set forth herein.

I. FACTUAL BACKGROUND

The Santa Susana Field Laboratory (hereinafter, "SSFL") is a former research facility situated on approximately 2,850 acres in southeastern Ventura County. (*Boeing Co. v.*

Mavoassaghi (9th Cir. 2014) 768 F.3d 832, 834.)[1] Beginning shortly after World War II, the federal government made and tested rockets, nuclear reactors, and various nuclear applications for war and peace at SSFL. (*Id.*) When built, the site was remote from developed communities, however, as of 2014 approximately 150,000 people lived within five miles of the site, and half a million people lived within ten miles. (*Id.*)

All of the nuclear and rocket research at SSFL has ended. (*Id.* at 835.) The federal Department of Energy (hereinafter, "DOE") ended its nuclear research there in the 1980s, and in 1996 decided to close its research center and remove many of its facilities. (*Id.*) The Air Force's and NASA's rocket research ended in 2006. (*Id.*) Operations at the site now consist of efforts to clean it up. (*Id.*)

There are multiple and substantial environmental impacts at the site. The soil and groundwater is contaminated with solvents, heavy metals, and other toxins. (*Id.* at 835.) Portions of the site are also impacted by radioactive contamination. (*Id.* at 836.)

A 290-acre area of the SSFL is known as Area IV. Historically, ten small nuclear research reactors were operated in Area IV to support the United States space program and for commercial applications. (DTSC 5891.)[2] This lawsuit concerns the demolition and disposal of the following six structures: Building 4005 (uranium carbide manufacturing facility, slab remaining only: above ground structure demolished in 1996), Building 4009 (OMR/SGR facility), Building 4011 (low bay), Building 4055 (nuclear materials development facility), Building 4093 (also called L-85, a research reactor with remaining slab and west wall, other above-ground structure demolished in 1995), and Building 4100 (fast critical experiment laboratory/advanced epithermal thorium reactor.) (DTSC 7647.)

Respondent Department of Toxic Substances Control (hereinafter, "DTSC") is the lead regulatory agency for the environmental soil and groundwater cleanup activities at SSFL pursuant to the Hazardous Waste Control Law (hereinafter "HWCL") and the Hazardous Substance Account Act (hereinafter, "HSAA"). (Health & Saf. Code §§ 25100 *et seq.*, 25300 *et seq.*)[3] These are the state law counterparts to the two federal laws that regulate hazardous wastes and hazardous waste cleanups, the Resource Conservation and Recovery Act (hereinafter, "RCRA"), and the Comprehensive Environmental Response, Compensation, and Liability Act (hereinafter, "CERCLA"). (42 U.S.C. §§ 6901 *et seq.*, 9601 *et seq.*)

Respondent Department of Public Health (hereinafter, "DPH") has authority as to radioactive materials that generally falls into three categories pursuant to two laws, the Radiation Control Law (§§ 114960-115273) and the Containment Law (§§ 114705-114835.) The three categories are: 1) radioactive materials licensing; 2) surveillance and control of radioactive materials, and 3) precluding the disposal of a particular category of radioactive material known

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[1] Petitioners as well as Respondents cite to this case to provide general factual background concerning the SSFL site.
[2] The parties have submitted three "records" for the Court's review. The parties refer to these as the "DTSC" record, the "DPH" record, and the "Stipulated Exhibits." The Court will refer to the documents in accordance with these designations. For purposes of the general factual background and history of this matter, the Court will refer primarily to the DTSC record. The Court will refer to the DPH record or the stipulated exhibits when necessary, and when evaluating the specific relevant claims in the "Discussion" section herein.
[3] All further statutory references are to the Health and Safety Code unless otherwise so indicated.

as "low level radioactive waste" at any facility not specifically licensed to receive it. SSFL has a DPH license for radioactive materials. (DPH 1.)

As part of ongoing cleanup and remediation efforts, in 2004, Boeing, NASA, and DOE jointly submitted to DTSC an RCRA Facility Investigation Report providing a description of a soil investigation completed at SSFL as well as the sampling data. (See DTSC 1189.) In 2007, DTSC entered into a Consent Order for Corrective Action for SSFL with Boeing, DOE, and NASA (hereinafter, the "2007 Consent Order"). (DTSC 1184-1257; DTSC 1223.) The 2007 Consent Order directs the signatories to prepare and submit, among other things, a plan for remediation of chemically contaminated soils, take certain interim measures including assessing available data, and prepare a Corrective Measures Study. The 2007 Consent Order acknowledges that the implementation of the final remedy for the contaminated soil and groundwater at SSFL is subject to environmental review pursuant to the California Environmental Quality Act (hereinafter, "CEQA"). (DTSC 1206.)

Also in 2007, the California legislature attempted to shift the regulatory authority over radioactive contamination (which authority belonged to the federal government) at SSFL to DTSC by passage of SB 990. (Health & Saf. Code § 25359.20.) In *Boeing v. Movassaghi*, the Ninth Circuit found SB 990 unconstitutional as violating the Supremacy Clause. (*Movassaghi*, 768 F.3d at 840-42.)

In 2010, DOE and DTSC entered into an Administrative Order on Consent (hereinafter, the "2010 AOC"). (DTSC 2101.) This AOC applies to Area IV and the Northern Buffer Zone of SSFL. The purpose of the order is to "define and make more specific DOE's obligations with respect to only the cleanup of soils at the Site." (DTSC 2102.) "Soils" is defined as "saturated and unsaturated soil, sediment, and weather bedrock, debris, structures, and other anthropogenic materials." (DTSC 2105.) However, "[a]ll provisions of the 2007 Order applicable to NASA and Boeing are not affected by the provisions of [the 2010 AOC] in any way." (DTSC 2102.)

Separate from DTSC's cleanup program, over the years Boeing undertook a building decommissioning and demolition program at SSFL. (See DTSC 2069.) Pursuant to California law, "decommission" means "to remove safely from service and reduce residual radioactivity to a level that permits release of the property for unrestricted use and termination of the license." (Cal. Code Regs., tit. 17, 30100, subd. (c).)

In 2012, Boeing amended its 2010 "Standard Operating Procedures: Boeing Demolition Debris Characterization and Management" (hereinafter, the "2012 SOP"). (DTSC 5898.) The 2010 SOP describes Boeing's efforts to demolish obsolete structures at SSFL. The 2010 SOP provides that it does not "include any soil removal action that might otherwise be considered site remediation." (DTSC 7827.)

The 2012 SOP "describes the process for demolishing non-radiological Boeing-owned buildings at SSFL. As part of that process, Boeing performs pre-demo radiological surveys and prepares a radiation survey and waste certification report..." (*Id.*) The 2012 SOP indicates that it was "approved by" DTSC. It further provides that "Boeing acknowledges the heightened interest in Area IV operations, and has coordinated with DTSC in planning demolition of Boeing-owned

buildings in Area IV. As a result of that coordination, DTSC has requested that the SOP be amended to specifically address application of the SOP to Area IV." (*Id.*) Accordingly, in 2012 and 2013, Boeing demolished the non-radiological structures and disposed of their debris. (DTSC 7809.)

During this time, DTSC entered into a contract with DPH, and an inter-governmental agreement with US EPA, to provide reviews of release survey documents for each of Boeing's six former radiological buildings. (DPH 6269-6276.) The scope of work provides,

> DTSC seeks [DPH] expertise on assessing the adequacy and completeness of the previous radiological surveys and release decisions, which were generated between 1980 and 1999...DTSC also seeks comment on the adequacy of post-decommissioning surveys conducted by the United States Environmental Protection Agency in 2002 and expertise and involvement in evaluating soils and building materials disposition. In the event that additional pre-demolition radiological surveys are recommended, DTSC seeks [DPH] support in reviewing the results and conclusions from such new surveys. (DPH 6272.)

In April 2013, DTSC requested Boeing revise the SOP with amendments to apply to Boeing-owned former radiological buildings in Area IV. (DTSC 7824.) In a cover letter to DTSC, Dave Dassler, Boeing Program Director of Santa Susana Site Closure comments that the amendments "address DTSC and Boeing comments during several conversations between DTSC, Boeing staff and representatives from DOE in recent months. Based on this level of involvement we are confident this procedure is acceptable to DTSC." (*Id.*) The SOP amendment itself provides,

> Boeing acknowledges the heightened interest in released former radiological buildings in Area IV, and has coordinated with DTSC and [DPH] in planning demolition of these buildings. As a result of that coordination, DTSC has requested that the SOP be amended to specifically address application of the SOP to former radiological buildings [sic] Area IV. (DTSC 7848.)

The SOPs are not signed, including either by DPH or DTSC.

In May 2013, DTSC notified Boeing via letter as to the results of its "Review of Notification Package for Planned Removal of Concrete and Asphalt at Former L-85 Area (Area IV..." (DTSC 7921.) The letter provides, "the proposed demolition and removal of the Buildings...from the site should not disturb chemically-impacted soil or other impacted surficial media currently under investigation by the SSFL Remedial Investigation program." (DTSC 7922.) The letter concludes,

> "DTSC will plan to be onsite during key phases of the demolition process to assure that the proposed activities and waste management procedures are implemented...DTSC will also observe additional radiological screening as recommended...Onsite demolition oversight may include a review of relevant

demolition documentation, including pre-demolition activities such as building abatement." (DTSC 7925.)

Between May 2 and May 7, 2013, Boeing removed the remaining asphalt, concrete, and wall at the L-85 site. (DTSC 7937.) During July and August 2013, Boeing prepared and submitted demolition notification packages for four of the remaining former radiological buildings.

Petitioners filed suit on August 6, 2013. Petitioners have alleged a cause of action against DTSC for violation of CEQA, a cause of action for unlawful underground rulemaking, and a cause of action for declaratory relief as to the allegations made in connection with the two prior causes of action.[4] Against DPH, Petitioners have alleged a cause of action for violation of CEQA, a cause of action for "violation of prior writ of mandate," a cause of action for unlawful underground rulemaking, and a cause of action for declaratory relief as to the prior allegations.

The Court, via the Honorable Alan Sumner, granted Petitioners' motion for preliminary injunction on December 11, 2013. The Court found that based "on the record to date" Petitioners were reasonably likely to prevail on their CEQA claim against DTSC, but not against DPH. The Court also concluded Petitioners were not reasonably likely to prevail on their APA claim. The Court also stressed "the preliminary nature of this motion." The Court then enjoined DTSC from approving Boeing's demolition and disposal activities without DTSC complying with CEQA.[5]

II. STANDARD OF REVIEW

Whether or not an activity is a "project" for purposes of CEQA is a question of law to be decided by the Court. (*Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, 131.)

III. DISCUSSION

Preliminary Issues

A. Letter from Christine L. Rowe

On May 1, 2018, the Court received a letter apparently sent from a Christine L. Rowe, with a number of documents attached, regarding the Court's ruling in this matter. This letter is not copied to any counsel or party in this matter nor does it otherwise indicate proof of service on the parties. Even if it had, the sender is not a party to this case, and has not filed for and obtained an order permitting it to file an *amicus curiae* brief in this matter. While the Court generally does not and cannot prevent members of the public from sending correspondence to the courthouse or from filing certain documents in pending cases, it is an entirely separate issue whether such materials can be properly considered by the Court. The Court is not permitted to consider improper ex parte communications, like this letter, which are intended to affect the Court's

[4] Petitioners also have a cause of action for "injunctive relief," which is not actually a separate cause of action but instead, a request for relief.

[5] Boeing subsequently filed a motion for summary judgment, which the Court, via the Honorable Alan Sumner, denied.

consideration of the merits of this case without notice to the parties and without following proper procedure to allow such submission. Under the law, the Court cannot consider and has not considered the letter in ruling on this matter.

B. Evidentiary objections

Petitioners have provided a section of their brief concerning alleged harms that have resulted from the "reliance upon underground regulations." In this section, Petitioners acknowledge that entitlement to the requested writ does not require demonstration of harm. The Court agrees, and finds the discussion provided in this section is irrelevant to the issues currently before the Court. Accordingly, the Court has not considered this part of Petitioners' brief, any opposition to these arguments presented by Respondents, or any arguments made in reply with regard to these arguments in ruling on this matter.

Given the Court's ruling herein, the Court declines to rule on the objections to evidence.

C. Request for judicial notice

In connection with their initial reply brief, Petitioners filed a request for judicial notice as to four documents. The Court notes it is improper for a party to seek to introduce new evidence in connection with a reply. The Court also finds that exhibits 1-3 are not relevant, and exhibit 4 is not appropriate for judicial notice. The request for judicial notice is **DENIED.**

Claims against DTSC

A. Violation of CEQA

It is undisputed that no agency has prepared an EIR in connection with the subject demolitions and removals. The sole question before the Court for purposes of this claim is whether Boeing's demolition and removal of the subject SSFL structures constitute a "project" (or multiple "projects") within the meaning of CEQA.

The Court notes that what is *not* before it for purposes of the instant claim is the propriety of the proposed or anticipated demolitions, and the Court cannot and does not make any determination as to the environmental impacts of the subject activities as the record does not contain an EIR for it to review.

A project is defined by Public Resources Code section 21065 as, an activity which may cause direct or indirect physical change in the environment and which is an activity carried out by a public agency, an activity approved by a public agency, or an activity funded by a public agency. In considering what activity constitutes a project, the Court is to consider "the whole of an action" that may directly or ultimately physically change the environment and includes the overall activity that is being approved. (14 Cal. Code of Regs. §15378.) If a state agency is considering approval of a project that is subject to CEQA, then it must prepare an Environmental Impact Report ("EIR") if the project "may have a significant effect on the environment." (Pub. Res. Code § 21100).

Here, Petitioners contend Boeing's activities constitute a project because DTSC *approved* the demolition and disposal.[6] Pursuant to Public Resources Code section 21065, subdivision (c)[7] a project is "an activity that involves the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies." To support the argument that DTSC issued a "lease, permit, license, certificate, or other entitlement for use", Petitioners cite to a myriad of communications between DTSC and Boeing, which the Court will attempt to summarize herein.

Petitioners contend that DTSC has been "approving" Boeing's structure demolitions for years, even in areas outside of Area IV. Petitioners cite to 2008 email communications, including a June 2008 email between DTSC employees that states,

> we notified Boeing that we wished to inspect ALL buildings prior to demolition and observe building demolitions...We asked for a schedule of building demos...Boeing is to provide us with a building inspection protocol this week for our review and approval with an updated Building demolition schedule. We are requiring advance notice for all building demos. We plan to inspect each building prior to demolition and we plan to be present to observed [sic] building demolitions. A similar request was made to NASA... (DTSC 1287.)

An August 11, 2009 DTSC internal email provides, "DTSC sent an email to Boeing requesting they provide information on the planned building demolitions...DTSC never provided approval for the building demolitions." (DTSC 1456.) Other internal emails cited by Petitioners discuss the demolition activities in the same manner, with reference to requesting documentation from Boeing and making certain determinations prior to approving or "allowing" structure removal. (See DTSC 1639.)

In 2009, DTSC sent communications to Boeing expressing concerns about the demolition activities and the SOPs, stating that they "may not result in DTSC being advised and involved in those demolition activities that require DTSC's oversight or approval." (DTSC 1520.) Boeing then undertook to revise the SOP, and DTSC internal emails discussing this revision provide, for example,

> The intent of the revised SOP is to assure there is a review process to identify – before demolition – that materials or media that have been impacted by chemical releases in areas proposed for building demolition are properly managed and disposed, and removal does not by-pass DTSC's approval obligation, CEQA assessment, and notification to the community. (DTSC 1661.)

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[6] There are no arguments that the actions are being carried out by DTSC or funded by DTSC, so the Court will not discuss those aspects of section 21065.

[7] For the first time on reply, Petitioners argue section 21065, subdivision (a) also applies to their claims. It is generally improper for a party to introduce evidence for the first time on reply. (*San Diego Watercrafts, Inc. v. Wells Fargo Bank* (2002) 102 Cal.App.4th 308; *Campos v. Anderson* (1997) 57 Cal.App.4th 784, 794 FN3; *Landis v. Pinkertons* (2004) 122 Cal.App.4th 985, 993.) Accordingly, the Court will not consider this argument.

The Court notes this same email chain includes a question as to "[w]hat is the facility allowed to remove before it becomes an interim 'cleanup activity' and trigger CEQA." (*Id.*)

DTSC then requested Boeing make changes to the SOP, after which DTSC initiated a 30-day comment period "to provide the community an opportunity to review and comment on the SOP prior to DTSC's final review and approval." (DTSC 1721.)

In June 2012, Boeing notified DTSC that it was going to demolish certain structures in Area IV. DTSC notified Boeing that it was "reviewing radiological characterization issues" for the structures and could not "concur with pre-demolition activities...that involve the removal or disturbance of any site features" until it concluded that review. (DTSC 2924.) Then, in September 2012, DTSC emailed Boeing that it had concluded its review and,

> concurs that pre-demolition radiological screening procedures meet or exceed regulatory and industry standards and that surface activity limits meet regulatory standards. Both the procedures and limits provide adequate assurance that fixed and removable radiological contaminants are not present in the pre-demolition materials. (DTSC 2969.)

The letter concludes,

> we are still reviewing the radiological screening criteria and standards for the full Area IV non-radiological building demolitions, and we plan to provide Boeing with our final comments and recommendations by early October 2012. (DTSC 2970.)

Via letter in October 2012, DTSC indicated that it had reviewed Boeing's notification of planned demolition for Area IV (building 4015) pursuant to the "requirements of a February 11, 2010 DTSC letter to Boeing, which allows DTSC thirty days to review and comment on Boeing's proposals for SSFL Building and structure demolitions." (DTSC 5805.) The letter then provides DTSC's "comments" on the planned demolition, including a finding that the activities "should not disturb chemically-impacted soil or other impacted surficial media currently under investigation by the SSFL Remedial Investigation (RI) program." (DTSC 5806.)

In December 2012, Boeing sought to begin demolition of the six structures at issue in this litigation. Boeing noted via email to DTSC that they were wondering when to "expect to receive an ok to proceed with pre-demolition and waste characterization sampling for the former radiological buildings (Boeing) in Area IV." (DTSC 6540.) The email requests that Boeing "be allowed to proceed" with the pre-demolition effort in advance of an "ok to proceed with demolition." (*Id.*)

In February 2013, an internal DTSC email indicates it received two Boeing proposals for demolition in Area IV. (DTSC 7039.) The email notes this is the "first former radiological site proposed under our oversight program with Boeing." (*Id.*) Boeing's second amendment to its SOP was submitted in March 2013, and in April 2013 Boeing indicated that it had "accepted

DTSC's comments" and attached a final version. (DTSC 7645.) The SOP indicates that it was "approved by [DTSC]." (DTSC 7647.) The Court notes the SOP also indicates Boeing has "*coordinated* with DTSC and [DPH] in planning demolition" of the buildings, in light of the "heightened interest in released former radiological buildings in Area IV." (*Id.*)

In May 2013, DTSC provided that it had reviewed Boeing's L-85 "Removal Package" and requested that Boeing submit certain debris for additional radiological screening. (DTSC 7921-22.)

Petitioners assert that these documents demonstrate that the Area IV radiologic demolition is a "project" on its own, and subject to CEQA requirements. Petitioners also argue the Area IV radiologic demolition is "part of the overall site remediation project for which the agency has acknowledged that an EIR is required." (MPA, pp. 24-25.)[8]

DTSC argues the subject structure demolitions are not a "project" because they do not require DTSC's prior authorization. DTSC argues Boeing is *already authorized* to demolish the subject buildings, and does not need DTSC to issue a "lease, permit, license, certificate, or other entitlement for use." DTSC contends,

> Petitioners have not identified anything in the [record] that is even arguably a lease, permit, license, certificate, or other entitlement for use issued by DTSC to Boeing that authorized the demolitions. This is because no such document exists...Nor do [the documents cited] identify a statute vesting DTSC with the power to authorize or not authorize Boeing to undertake its demolitions. Nor do [the documents cited] purport to grant Boeing a legal entitlement... (Oppo., p. 27.)

DTSC maintains its actions in connection with Boeing's proposed demolition activities are in accordance with efforts to gather information and observe private activities that could impact the SSFL site investigation and cleanup. DTSC argues these efforts are part of its responsibilities under the HWCL and the HSAA, but are not the equivalent of the issuance of a permit, license, certificate, or other entitlement for use.

Pursuant to section 25185, DTSC has the authority to conduct inspections in any environment where hazardous wastes are stored, handled, processed, disposed of, or being treated. DTSC can also carry out any sampling activities necessary, inspect and copy records, and photograph waste. (*Id.*)(See also § 58009.) DTSC maintains it was exercising its broad investigative authority when it requested that Boeing amend its SOP, commented on its demolition packages, and observed the demolitions themselves. DTSC cites to sections in its letters where it analyzes whether the proposed demolition would "disturb chemically-impacted soil or other impacted surficial media currently under investigation by the SSFL Remedial Investigation program" (DTSC 7922.)

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[8] The Court notes that it will not include a discussion of the 2010 AOC between DOE and DTSC, despite Petitioner's insistence that it is relevant. Boeing is not a party to the 2010 AOC, and it acknowledges the fact that DOE does not control the Boeing-owned structures.

DTSC then asserts, without citation to any legal authority, that "[h]ad DTSC determined that a demolition might compromise the site investigation, the HWCL and the HSAA authorize DTSC to issue an enforcement order enjoining the demolition." DTSC states that Petitioners have not alleged a cause of action in this matter for abuse of discretion as to DTSC's enforcement authority over Boeing, and accordingly, not only does the decision regarding an enforcement action *not* trigger CEQA, but Petitioners also do not state a claim as to the enforcement authority itself.

The parties argue as to the application of *Bozung v. Local Area Formation Comm.* (1975) 13 Cal.3d. 263.[9] In *Bozung*, taxpayers sought to establish that CEQA required a Local Agency Formation Commission to prepare an EIR prior to approving a city's annexation of property intended for future development. (*Id.* at 267.) The LAFCO acknowledged that it had approved the annexation, but contended it was bound by the Knox-Nisbet legislation, which governed LAFCOs specifically. (*Id.* at 273-74.) The Court determined the annexation clearly involved an "entitlement for use" that the city could choose to use, or not use should it choose not to go forward with the annexation. (*Id.* at 279.)

DTSC argues *Bozung* demonstrates that CEQA involves a statutorily required approval, versus here, where Boeing was not required to obtain any sort of approval from DTSC prior to engaging in its demolition activities. Petitioners argue DTSC is incorrect, and cite to the following language, "even complete impotence to approve or disapprove contemplated actions of a local agency does not make the consideration of an EIR by a regional agency an idle act." (*Id* at 284.) Petitioners contend this language demonstrates that even if DTSC cannot stop the demolition project, its "analysis of the environmental impacts of demolition....are critical to ensure that the public and the environment will not be adversely impacted by the activity." (Reply, p. 14.)

The Court does not find the passage cited by Petitioners to be persuasive in this matter. The language contemplates a regional agency which is approving a local agency's actions. Further, *Bozung* goes on to indicate that this quote is directing that a regional agency should *review an EIR that has been prepared by a local agency*:

> [A] threshold question before the appellate court was whether the plaintiffs should have challenged the adequacy of the EIR by administrative mandamus directed to the county planning commission. The plaintiffs asserted that an injunction against the water district was the proper remedy, because the planning commission had no authority to veto the project. [citation] The court agreed with plaintiff's basic position, and rejected the defendant's contention that the court's decision would make the district's filing of an EIR with the planning commission an idle act: "We do not accept this conclusion...[The] planning agency by criticism and by adverse comment may persuade the directors of a district to revise an EIR. Revision of a project itself, or even

[9] The Court acknowledges that the parties have cited to a myriad of other cases, and it will not endeavor to summarize them all. The Court has referenced those cases that it has found to be most helpful/instructive based on the facts of the current matter. An absence of a citation to a specific case does not indicate the Court did not consider said case.

> abandonment, may follow, not by the use of any authority of the planning commission which is not given by the act, but by reason of thoughtful reconsideration. (*Id.* at 284-85.)

Thus, the language Petitioners quote from *Bozung* indicated that an agency should review and comment upon an EIR prepared by another agency, even if it did not have the power to approve or prohibit the subject project. It described a circumstance in which the parties acknowledge that CEQA was triggered by some sort of approval. Here, Petitioners are arguing a state agency should prepare an EIR in connection with a private party's actions, with no CEQA triggering approval action identified. The circumstance discussed in *Bozung* and that here are not comparable.

The Court is also guided by *Parchester Village Neighborhood Council v. City of Richmond* (2010) 182 Cal.App.4th 305, another case cited by both Petitioners and DTSC. In *Parchester*, a city supported a Native American tribe's efforts to acquire a proposed casino site, and agreed to make certain municipal services available to the tribe, based on payment terms specified in an agreement between the parties. (*Id.* at 308.) In finding CEQA did not apply, the Court noted the casino endeavor did not constitute a "project" of the city because,

> the City has no legal authority over the property upon which the casino will be situated...an agency does not commit itself to a project 'simply by being a proponent or advocate of the project...[further] the City has no legal jurisdiction over the property. Should the City change its mind and decide to 'disapprove' of the project, its decision would not be binding on [the tribe.] (*Id.* at 313)(citations omitted.)

The Court of Appeal also found the agreements between the City and the tribe, including the City's endorsement of the application, were not "projects" within the meaning of CEQA. (*Id.* at 314-320.)

The Court finds *Parchester* and *Bozung* support DTSC's contention that CEQA is implicated by a legal authority over the subject activity that is purported to constitute a "project." Here, Petitioners have not cited to any *legal* authority retained by DTSC to prevent Boeing from undertaking the subject demolition activities such that DTSC's refusal to "approve" the actions would have prevented Boeing from moving forward. Both Boeing and DTSC assert there is no such authority, and emphasize that DTSC never issued a "lease, permit, license, certificate, or other entitlement for use" as required to trigger Public Resources Code section 21065, subdivision (c).

The Court acknowledges that the dealings between Boeing and DTSC use the terms "approve," "ok to proceed," "concur," and even chastisement for some Boeing activities taken without first consulting DTSC. However, these actions appear to have been undertaken in relation to Boeing's efforts to seek input and advice from DTSC on the safest practices for proceeding with its demolition activities in Area IV, rather than pursuant to any legal obligation to gain some sort of entitlement for use from DTSC. The Court also recognizes DTSC's inspection authority, and Petitioners have not presented any legal authority that when DTSC

invokes its inspection authority it is inherently approving a project for purposes of Public Resources Code section 21065, subdivision (c).

The Court also finds there is insufficient evidence to establish that Boeing's structure demolition is part of the overall site remediation.

Petitioners' first cause of action is **DENIED** as to DTSC.

B. Violation of the Administrative Procedure Act

Petitioners' Third Cause of Action alleges that DTSC adopted underground regulations in violation of the Administrative Procedure Act (hereinafter, the "APA"), Gov. Code sections 11340, et seq. Petitioners allege Respondents, "in issuing their approvals of Boeing's demolition and disposal activities" have relied upon Regulatory Guide 1.86, DOE 5400.5, an undated document generated by DPH's Radiologic Health Branch (referred to as "Decon-1), and a 1991 policy memorandum (referred to as "IPM-88-2.) (Pet., ¶ 84.)

Pursuant to Government Code section 11340.5, subdivision (a),

> No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in Section 11342.600, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter.

Regulation is defined as,

> every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure.

Pursuant to the APA, an agency must,

> give the public notice of its proposed regulatory action; issue a complete text of the proposed regulation with a statement of the reasons for it; give interested parties an opportunity to comment on the proposed regulation; respond in writing to public comments; and forward a file of all materials on which the agency relied in the regulatory process to the Office of Administrative Law, which reviews the regulation for consistency with the law, clarity, and necessity. (*Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 568.)

The Supreme Court noted that a regulation subject to the APA has two principal identifying characteristics,

> First the agency must intend its rule to apply generally, rather than in a specific case. The rule need not, however apply universally; a rule applies generally so long as it declares how a certain class of cases will be decided. Second, the rule must implement, interpret, or make specific the law enforced or administered by [the agency], or ... govern [the agency's] procedure. (*Id.* at 571)(citations omitted.)

Petitioners argue "in explicit contravention of the APA, DTSC and DPH have fashioned a body of underground law...and applied that underground law to their regulation of SSFL." (Memo., pp. 28-29.) Petitioners maintain, "DPH and DTSC have jointly applied the radiological release standards to a clear and definable class of cases: the demolition of radiologically contaminated structures, and disposal of the resulting waste. Every demolition approval issued thus far for buildings at SSFL has been evaluated under these criteria." (*Id.* at 30.)

With regard to DTSC, Petitioners cite to an April 25, 2013 letter from DTSC regarding L-85 in Area IV.[10] (DTSC 7928.) The document presents the findings of DTSC's review of Boeing's documents summarizing the "Final Status Survey of Non-Building Area Remaining Concrete and Asphalt" located at L-85. The letter provides general comments and recommendations, one of which provides that,

> [t]he documents indicate that all instrument surface activity measurements and wipe tests were below the detection limit, the level at which there is a 5% probability of incorrectly concluding that no activity is present when it is indeed present...All surface activity measurements met the general surface activity limits for release/clearance of equipment and materials for unrestricted use from former radiologic facilities and were below US NRC Regulatory Guide 1.86, USDOE Order 5400.5 and CDPH guidance DECON-1 and IPM-88-2 action levels. Survey results support these conclusions. (*Id.*)

Petitioners also cite to an email from Boeing to DTSC and DPH dated February 15, 2013 which provides, in pertinent part,"[d]uring last Tuesday's meeting, Jerry Hensley asked about release criteria used in the various surveys conducted at the former Boeing radiological buildings in Area IV. A meeting between DTSC and [DPH] was scheduled...to discuss this subject. It was suggested that Boeing could facilitate and expedite [this] review by identifying sections...where release criteria were specified..." (DPH 5118.) The letter then refers to an attached "Table 1 matrix." (DPH 5122.) Petitioners contend this table, and the excerpts from the release reports demonstrate that the release criteria used were the purported underground regulations.

Petitioners then maintain "both DTSC and DPH have relied upon these standards in the remediation of the Hunters Point Naval Station in San Francisco, where DTSC is the state agency overseeing the remediation of a radiologically-contaminated former naval facility." (Memo., p. 33.) Petitioners then cite to a 2006, "Final Action Memorandum" regarding removal of radiological materials from Hunters Point Shipyard.: (Stip. Exh. 47, p. 10.) The stated purpose

[10] Petitioners assert that the letter is dated May 1, 2013, but the record citation provided is to an April 25, 2013 letter.

of the memorandum is to "document...the U.S. [Navy's] decision to undertake time-critical removal actions...at areas throughout the base that may contain localized radioactive contamination..." (*Id.*)

Petitioners cite to the memorandum's description of radioactive contamination limits, "these limits are based on AEC's *Regulatory Guide 1.86*. Limits for removable surface activity are 20 percent of these values." (*Id.* at 24)(emphasis in original.) The memorandum appears to have been prepared by the Navy. (*Id.* at 2, 5.)[11]

With regard to this first prong of the *Tidewater* test, DTSC argues Petitioners have failed to demonstrate that DTSC is applying the four documents (which DTSC refers to in its brief as the "Guidance Documents") to a clear and definable class of cases. DTSC notes that it was the Navy and the USEPA, not DTSC, who selected the radiological release criteria in the 2006 memorandum. DTSC also argues that Petitioners are able to identify only SSFL and Hunters Point as locations where DTSC is purportedly applying the four documents, which does not make it a standard of general application.

Petitioners respond that by calling the four documents "the Guidance Documents," DTSC has admitted it is using them as underground regulations. The Court does not agree with this argument. While it may agree that calling the documents "the Guidance Documents" may be an odd characterization, such a reference in a legal filing alone does not convert the documents into underground regulations absent a finding they are being applied as such, pursuant to the *Tidewater* test.

The Court finds the evidence cited by Petitioners fails to demonstrate that DTSC is using underground regulations to "apply a rule generally" or "declare how a certain class of cases will be decided" as required by *Tidewater*. While Petitioners have provided anecdotal evidence that DTSC has referred to the four documents in reviewing activities with regard to radiological release limits, Petitioners have not identified any evidence that DTSC *requires* the limits described by the four documents, or has *disapproved* action that does not comply with those limits. *Tidewater* directs that an underground regulation is one that directs how a "certain class of cases will be decided." In Petitioners' examples, the four documents (and their standards) are referenced (usually by the private entity, not by DTSC), but Petitioners have not demonstrated that DTSC required compliance with the four documents prior to enforcement of, or compliance with, a law within DTSC's jurisdiction.

Petitioners' third cause of action is **DENIED** as to DTSC.

C. Declaratory and Injunctive relief

In light of the Court's above findings, Petitioners' fourth and fifth causes of action, which are predicated on the same facts, are **DENIED** as to DTSC.

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[11] Petitioners also cite to a variety of documents wherein DTSC reviews Boeing's demolition notification documents. (See DTSC 5810.) The Court has also reviewed these arguments and these documents.

Claims against DPH

A. Violation of CEQA

Again, it is undisputed that no agency has prepared an EIR in connection with the subject demolitions and removals. The sole question before the Court for purposes of this claim is whether Boeing's demolition and removal of the subject SSFL structures constitute a "project" or multiple "projects" within the meaning of CEQA.

Pursuant to Public Resources Code section 21069, a "responsible agency" is "a public agency, other than the lead agency, which has responsibility for carrying out or approving a project." Petitioners contend DPH is a "Responsible Agency" due to its authority over SSFL as a licensor, and consequently subject to CEQA in its "approval" of Boeing's demolition of the subject structures. Petitioners argue DPH's status as a "responsible agency" arose when it released Boeing structures from the subject Radioactive Materials Licenses (specifically building 4100).

Pursuant to Title 14, California Code of Regulations, section 15352, subdivision (a), " 'Approval' means the decision by a public agency which commits the agency to a definite course of action in regard to a project intended to be carried out by any person." Pursuant to subdivision (b), with regard to private projects, "approval occurs upon the earliest commitment to issue or the issuance by the public agency of a discretionary contract, grant, subsidy, loan, or other form of financial assistance, lease, permit, license, certificate, or other entitlement for use of the project."

To support their argument that DPH approved demolition by way of decommissioning Building 4100, Petitioners refer to the fact that in August 2012, DPH had information as to the status of Boeing-owned buildings in Area IV scheduled for demolition. (DPH 4516.) Then, in November 2012, DPH received a request from Boeing for "release of building 4100 for unrestricted use, and removal of the building from radioactive materials license 0015-19 as an authorized place of use." (DPH 4668.) Petitioners maintain DPH was on notice that release from the license was necessary to enable Boeing to demolish building 4100. Via email to several DPH employees dated January 21, 2013, Boeing provides.

> The DTSC has recently given the go-ahead to begin pre-demo work on several Boeing-owned former released radiological facilities in Area IV, including building 4100 which is still awaiting your release. Boeing anticipates completing this pre-demo work and submitting the Demolition Notification Package for DTSC review on March 28.
>
> We therefore respectfully request that your review and release process be expedited to be completed by March 28. (DPH 4823.)

Via internal DPH email, dated January 22, 2013, an employee in the Radioactive Materials Licensing Section provides, "Please work on this request...We may [sic] to be to

ensure this project is completed prior to 3/28/13 so that we won't be impeding its demolition process schedule." (DPH 4825.)

Petitioners then reference DPH's other activity at SSFL as being "defined in its contact with DTSC" and assert that DPH intentionally removed any language that "sounded remotely like it was authorizing Boeing to take any specific action" from the contractual memorandum.

A property may be removed from a DPH license, and the license terminated, via decommissioning. Decommission means "to remove safely from service and reduce residual radioactivity to a level that permits release of the property for unrestricted use and termination of the license." (17 C.C.R. § 30100, subd. (c).) Decommissioning occurs when DPH determines that,

> (1) Radioactive material has been properly disposed;
> (2) Reasonable effort has been made to eliminate radioactive contamination, if present; and
> (3) A radiation survey has been performed which demonstrates that the premises are suitable for release for unrestricted use; or other information submitted by the licensee is sufficient to demonstrate that the premises are suitable for release for unrestricted use. (17 C.C.R. § 30256, subd. (k).)

DPH argues it has not proposed to carry out or approve a project, because neither the decommissioning of Building 4100, nor the Contractual Memoranda, is an entitlement for use.[12]

With regard to the decommissioning of Building 4100, DPH contends it did not issue to Boeing an entitlement with respect to anything that Boeing might do with the property *after* it was decommissioned. DPH cites to the "Final Status Survey Report for Area IV Building 4100" requesting the decommissioning, and notes that it does not include any plans for the subject demolition. (DPH 4669.) DPH acknowledges that this Report includes a notation as to what will become of "post-demolition debris from 4100" (DPH 4694) but argues this was not a description of the demolition specific enough to constitute DPH approval.

DPH cites to *Bridges v. Mt. San Jacinto Community College Dist.* (2017) 14 Cal.App.5th 104, and *Concerned McCloud Citizens v. McCloud Community Services Dist.* (2007) 147 Cal.App.4th 187. The Court finds *Bridges* is unavailing as the project at issue was a *public* project, and the public agency acknowledged that CEQA applied to its construction of the facilities at issue. The Court merely determined that the public agency was not required to complete an EIR prior to opening escrow on the subject property. *Concerned McCloud Citizens* also involves a circumstance wherein the public agency's agreement was expressly conditioned on subsequent compliance with CEQA. Consequently, entering into an agreement to take future vague actions was not approval of a project for purposes of CEQA.

The Court has reviewed the cases cited by Petitioners (see, e.g. Reply, fn. 3) and finds they are all factually distinct such that their CEQA analyses are not instructive in this matter.

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[12] The Court will not repeat its CEQA recitation herein, and instead directs the parties to its discussion in connection with the CEQA claim against DTSC.

Petitioners' argument is that every time DPH engages in the decommissioning process, it is approving a project that will follow the decommission, so long as it has information as to what the subsequent activity will be (in this case, because DPH was informed that Boeing wished to demolish the structure, the decommissioning process should have been subjected to an additional CEQA analysis.)

By decommissioning Building 4100, DPH did not commit to a definite course of action in regard to a project intended to be carried out by Boeing, and therefore, did not provide an "approval" as defined in Code of Regulations Title 14, section 15352. While Boeing indicated it intended to demolish the subject building, the decommissioning was not conditioned on Boeing following through with this intention. Further, as DPH argues, once a property has been decommissioned, it has been released for "unrestricted use" and DPH no longer has any authority to direct a licensee how to proceed. Petitioners do not argue DPH failed to comply with Code of Regulations Title 17, section 30256, subd. (k) in connection with the decommissioning of Building 4100, so the Court must presume the decommissioning was properly completed.

Petitioners do not cite to any authority vested in DPH to direct the future of building 4100 subsequent to its decommissioning. While Boeing did indicate to DPH that it intended demolition, there is no evidence that the specific details of the demolition were before DPH for purposes of consideration in connection with the decision to decommission, and no evidence that DPH "approved" the demolition itself by engaging in the decommissioning process. The Court therefore finds DPH did not grant an "entitlement for use" pursuant to CEQA in decommissioning Building 4100.

Petitioners do not reply to DPH's argument that the contractual memoranda were not subject to CEQA. The Court agrees with DPH that, pursuant to the contract, DPH merely reviewed and commented on certain documents provided by Boeing to DTSC. Nothing about the contractual memoranda implicates "issuance of a lease, permit, license, certificate, or other entitlement for use."

B. Violation of the Administrative Procedure Act

Petitioners' Third Cause of Action alleges that DPH adopted underground regulations in violation of the Administrative Procedure Act (hereinafter, the "APA"), Gov. Code sections 11340, et seq. Petitioners allege Respondents, "in issuing their approvals of Boeing's demolition and disposal activities" have relied upon Regulatory Guide 1.86, DOE 5400.5, an undated document generated by DPH's Radiologic Health Branch (referred to as "Decon-1), and a 1991 policy memorandum (referred to as "IPM-88-2.) (Pet., ¶ 84.)

The Court will not repeat its discussion of the background of the APA, already stated in its discussion concerning DTSC above. However, the Court will restate the *Tidewater* test wherein regulation subject to the APA has two principal identifying characteristics,

> First the agency must intend its rule to apply generally, rather than in a specific case. The rule need not, however apply universally; a rule applies generally so long as it declares how a certain class of cases will be decided. Second, the rule

must implement, interpret, or make specific the law enforced or administered by [the agency], or ... govern [the agency's] procedure. (14 Cal. 4th at 571)(citations omitted.)

Petitioners argue "in explicit contravention of the APA, DTSC and DPH have fashioned a body of underground law...and applied that underground law to their regulation of SSFL." (Memo., pp. 28-29.) Petitioners maintain, "DPH and DTSC have jointly applied the radiological release standards to a clear and definable class of cases: the demolition of radiologically contaminated structures, and disposal of the resulting waste. Every demolition approval issued thus far for buildings at SSFL has been evaluated under these criteria." (*Id.* at 30.)

With regard to DPH, Petitioners cite to "many" documents describing a "consistent program of enforcement and licensure" relying on the four documents. The first example Petitioners provide is what they deem the "DPH Radioactive Material License Amendments (1999-2013)." (Memo., p. 30.) Petitioners cite to nine SSFL license amendments, and asserts that each of these amendments "reference and rely upon one or more of the same four underground standards." (Stip. Exhs. 1-9.) Petitioners also refer to the February 15, 2013 Boeing email discussed above in connection with the Court's analysis of Petitioners' claims against DTSC.

Petitioners then provide that DPH has "relied upon the general standards throughout California, when DPH was faced with similar licensing and enforcement situations." (Memo., p. 31.) Petitioners then cite to examples from General Atomics, University of California, Berkeley, and Stanford University. (citing various Stip. Exhs., e.g. 21-45.) While the majority of documents are those submitted *to DPH* from the private entity (with no indication that DPH required or instructed the entity to use any of the four documents in making its calculations), Petitioners also cite to a November 19, 2013 letter from DPH to Stanford University regarding its request to decommission and remove a particular use location from its radioactive materials license. (Stip. Exh. 30, p. 51.) In this letter DPH provides,

> The Radiologic Health Branch (RHB) has begun processing your request to decommission...In order to process your request, please respond to the following items... 4) Confirm that your free release criteria are 1000 dpm/100 cm^2 removable. (*Id.*)

DPH responds that none of the four documents are binding, and that contrary to Petitioners' claims, DPH performs decommissioning on a "case-by-case" basis. DPH contends Petitioners' examples demonstrate that the licensee proposes the release criteria, and that often the licensee chooses to utilize the four documents in doing so. DPH also identifies circumstances when the amendment incorporates release criteria modified from the four documents, such as an October 17, 2003 letter from DPH to Boeing regarding an amendment to radioactive materials license number 0015-19. (Stip. Exh. 8, p. 1.) The "Surface Contamination Guidelines" provides that the limits provided in DOE Order 5400.5 have been modified by "specifying the potential contaminants present in the Rocketdyne facilities, and eliminating those that are not pertinent." (*Id.* at 20.)

With regard to the comment by DPH in the November 19, 2013 letter requesting that Boeing "confirm" its free release criteria were at a certain level, DPH contends the table Stanford provided was not a complete reproduction of Reg. Guide 1.86, and therefore DPH was merely requesting clarification as to the criteria being proposed.

The Court finds the documents Petitioners rely on as evidence that DPH is imposing certain underground regulations on licensees are documents that were submitted *to* DPH wherein the entity seeking the license amendment referred to Reg. Guide 1.86 limits when discussing release criteria. The Court finds evidence that entities are submitting documentation to DPH in reliance on the four documents is not a violation of the APA. As discussed in *Tidewater*, the APA is concerned with an *agency's* rule that the *agency* intends to apply generally. Evidence that private entities are relying on the four documents in discussing release criteria does not meet the first prong of the *Tidewater* test.[13]

The Court finds Petitioners have failed to identify evidence that *DPH* is applying an underground regulation by way of the four documents to a clear and definable class of cases: the demolition of radiologically contaminated structures, and disposal of the resulting waste. While the Court acknowledges the comment in the November 19, 2013 letter *could* be evidence that DPH is requiring licensees to comply with Reg. Guide 1.86, DPH's explanation that the comment was merely a clarification as to what was being proposed is also possible. Accordingly, the Court finds Petitioners have not proven DPH is applying an underground regulation by way of the four documents.

The third cause of action is **DENIED** as to DPH.

C. Violation of the 2002 Peremptory Writ of Mandate

Petitioners argue that DPH's use of the four documents to perpetuate an underground regulation is also a violation of the Court's order in *Committee to Bridge the Gap v. Bonta* (Case No. 01CS01445) that DPH cannot adopt any numeric clean-up standards for radioactive materials without first complying with CEQA and the APA.

As the Court has already found DPH is not violating the APA and is not using the four documents as an underground regulation, the second cause of action is also **DENIED**.

D. Declaratory and Injunctive relief

In light of the Court's above findings, Petitioners' fourth and fifth causes of action, which are predicated on the same facts, are **DENIED** as to DPH.

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[13] The Court notes that both DPH and Petitioners (in their reply brief) make arguments that are not relevant to the cause of action for violation of the APA. (For example, Petitioners appear to allege a violation of Regulation 30256, subdivision (k)(2), but there is no cause of action as to a violation of this regulation.) The Court has read and reviewed, but will not comment on these arguments.

IV. CONCLUSION

The petition for writ of mandate and complaint for declaratory and injunctive relief is **DENIED**.

//

Counsel for Respondents shall prepare an order incorporating this ruling as an exhibit to the order, and a judgment; Counsel for Petitioners and Counsel for Real Party in Interest shall receive a copy for approval as to form in accordance with Rule of Court 3.1312(a); and thereafter submit it to the Court for signature and entry in accordance with Rule of Court 3.1312(b).

Certificate of Service by Mailing attached.

CERTIFICATE OF SERVICE BY MAILING
C.C.P. Sec. 1013a(3))

I, the undersigned deputy clerk of the Superior Court of California, County of Sacramento, do declare under penalty of perjury that I did this date place a copy of November 19, 2018 **RULING ON SUBMITTED MATTER RE: PETITION FOR WRIT OF MANDATE AND COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF** in envelopes addressed to each of the parties, or their counsel of record as stated below, with sufficient postage affixed thereto and deposited the same in the United States Post Office at Sacramento, California.

Jeffrey P. Reusch, Esq.
Department of Justice
Office of the Attorney General
1300 I Street
P O Box 944255
Sacramento, CA 94244-2550

Andrea Sheridan Ordin, Esq.
Beverly Grossman Palmer, Esq.
STRUMWASSER & WOOCHER LLP
10940 Wilshire Blvd., Suite 2000
Los Angeles, CA 90024

David Zaft, Esq.
Department of Justice
Office of the Attorney General
300 S. Spring Street, Suite 1702
Los Angeles, CA 90013

Gordon E. Hart, Esq.
PAUL HASTINGS LLP
101 California Street, 48th Floor
San Francisco, CA 94111

Dated: November 19, 2018

Superior Court of California,
County of Sacramento

By: E. GONZALEZ,
Deputy Clerk